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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1309

THE KRESGE FOUNDATION, a Michigan corporation,
Petitioner,

vs.

LOUIS SCHLESINGER COMPANY,
a corporation of New Jersey,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Question Presented

In the procedural and factual circumstances of this case, does a disposition of the question on which the review is urged involve the presence of the special and important reasons traditionally measuring the exercise of the Court's discretion in the consideration of a Petition for a writ of certiorari?

The question upon which Petitioner seeks review is: Is federal jurisdiction which was acquired upon removal from the state court on grounds of diversity after attachment defeated by the filing of an amended complaint which sets forth the same grievance originally pleaded but in greater detail, and which amended complaint does not set forth a new and independent cause of action?

Statement of the Case

Respondent, Louis Schlesinger Company, herein referred to as "Broker" or "Plaintiff", a New Jersey corporation, licensed as a real estate broker in New Jersey, brought this action in the Superior Court of New Jersey against petitioner, a Michigan Corporation, herein also referred to as Landlord, or Kresge, or Defendant owner of a department store building in Newark, New Jersey. The suit seeks commissions alleged to be due under a commission agreement between the parties: The commissions are claimed by virtue of a 1964 lease agreement between Kresge and its tenant, Western Electric Company, Incorporated, hereinafter referred to as "Tenant", procured by Broker, which lease both (i) extended the tenancy of a 1957 lease between Landlord and Tenant, hereinafter referred to as the "early lease"; and (ii) provided for the taking of additional space by the Tenant in the same building.

The facts giving rise to the suit material to the question presented follow.

The commission agreement of December 12, 1956 includes the language of Rule (e) of the Detroit Michigan Board Rates and Rules, P. 5a.

The early lease included a clause relating to a renewal option and a right of first refusal respecting additional space in the building.

> "3. The Lessee shall have the option to renew this lease for an additional period of five years upon the same terms and conditions upon written notice thereof sent to the Lessor at 3727 Second Boulevard, Detroit, Michigan, at least nine (9) months prior to the expiration of the term of this lease. The Lessor shall offer first to the Lessee, which shall have the right of first refusal, to rent any other space in the building, and available for leasing, of which the demised space is a part, which may become vacant during the term of this lease, at a rental to be agreed upon by the parties. The Lessor's offer shall be in writing and must be accepted by the Lessee by notice in writing to the Lessor within thirty (30) days after receipt of said offer."

Tenant occupied floors 8 and 9 in the building under the early lease and in April, 1957 Kresge paid to Broker a commission for the ten year term of the tenancy aforesaid on the two floors named.

Prior to the expiration of the ten year term of the early lease, Landlord and Tenant entered into another lease agreement dated June 9, 1964 wherein the premises demised consisted of the original two floors, 8 and 9, mentioned in the early lease, and three additional floors, 5, 6 and 7 in the same building.

After Kresge failed to respond to Broker's inquiry seeking information as to the details of the June 9, 1964 lease, Broker commenced this suit on September 15, 1964 by filing the original complaint, verified by affidavit, the latter stating the amount of the commission to be $157,500.00.

The writ of attachment was thereupon issued pursuant to order of the Court and served on Defendant. Under New Jersey practice, *in rem* jurisdiction was thereby acquired. The district judge reviewed the procedural history on commencement of the action in the earlier of his two opinions, P, App. D.

Prior to filing any answer, Kresge moved to dismiss the action or quash the writ. The motion was denied and an order was entered accordingly pursuant to the opinion of the district court judge. P. App. D. p. 27a.

The present Petition focuses on the filing of the amended complaint alleging the filing thereof to constitute an act fatal to the jurisdiction of the Court.

In addition to the inaccuracies of fact in the Petition relating to the substance of the commission agreement implicitely corrected above, Broker here expressly corrects inaccuracies in Kresge's Statement of the Case as follows:

1. Kresge and Western Electric never "terminated" the lease of June 9, 1964, as stated in the Petition. The 1964 lease, dated June 9, when amended by the parties, continued to bear the June 9, 1964 date as recorded in the Office of the Register of Essex County on October 1, 1964. On the motion to dismiss in the district court, notwithstanding Broker's introduction of the recorded lease dated June 9, 1964, Petitioner did not advance to the court or Broker any claim of a prior lease agreement of the same June 9, 1964 date. The recorded June 9, 1964 document was the sole lease agreement bearing that date known to the court and the Respondent until the document unrecorded bearing the date June 9, 1964 was revealed in the course of discovery proceedings July 27, 1965, more than seven months after the district court's December, 1964 denial of the Petitioner's motion to dismiss.

2. Factually, there is only one lease transaction in 1964 and the parties to the lease as well as Chase-Newark Corporation purchaser of the fee of the leased premises and indemnitor of Kregse on claim of the Broker have always referred to "the June 9, 1964 lease" as meaning the recorded document. There never existed a September 14, 1964 lease to which reference is made in the Statement of the Case in the Petition, at page 5. Reference by Kresge to a September 14, 1964 lease is a patent attempt to mislead.

3. The proofs produced by affidavit filed in the district court on the test of the jurisdiction brought on by Kresge's motion to dismiss the action or quash the writ of attachment clearly placed the Broker's claim for the renewal *and* the taking of additional space before the court. The original complaint was filed at a time when Broker was not aware of the specific details of the lease agreement, but claimed commissions on the basis of knowledge then available.

4. The amended complaint was filed by Broker while the arguments on the motion to dismiss were under advisement by the court. Circumstances of the filing of the amended complaint are material. There was then pending before this Court, Defendant's motion to dismiss, or to quash the writ of attachment, hereinafter referred to as "Defendant's earlier motion", both on jurisdictional grounds. The motion had been served and filed with accompanying brief on October 13, 1964.

Plaintiff's brief in answer was filed and served November 4, 1964, with affidavits to buttress the position of Plaintiff on the inquiry of the court as to the existence of a *prima facie* case. The nature of the court's inquiry is more particularly set forth in the opinion of the district court on the earlier motion reported in 236 F. Supp. 373.

On November 16, 1964, Plaintiff filed an affidavit to which were annexed the early lease and the lease of June 9, 1964, which had been recorded in the Office of the Register of Essex County on October 1, 1964 in Book 4047 of Deeds for Essex County, at page 350.

On November 25, 1964, Plaintiff served and filed a supplemental memorandum in response to interest indicated by the court on November 23, 1964, at the continued hearing on the motion, as to decisions which might shed light upon the meaning of the Detroit Rules (Detroit, Michigan, Real Estate Board 1956). The supplemental memorandum invited the attention of the court to the case of *Zinn & Co.* v. *Shawnee Pottery Co.,* 148 F. Supp. 322, aff'd *per curiam* (C. A. 6), 240 F. 2nd 958 (Ohio). On page 2 of the memorandum cited, the following appears:

> "The substantive issue in which the Court is interested in this motion is severable into two propositions, i.e. (a) Is a *prima facie* case shown in the complaint and/or affidavits with respect to the Plaintiff's right to commissions based upon a renewal by the parties of the tenancy on floors 8 and 9 at 715 Broad Street, Newark, New Jersey, by virtue of the lease of June 9, 1964?; and (b) Is a *prima facie* case shown in the complaint and/or affidavits with respect to Plaintiff's right to commissions for the taking of additional space by tenant (floors 5, 6 and 7)?"

It is vital to note that without question the issue of commissions on the *renewal,* as well as the issue of commissions on the *taking of additional space,* was presented to the court prior to its decision and the said decision was made by the court *while mindful of these issues.*

Subsequent to the filing of the supplemental memorandum of the Plaintiff as aforesaid, Defendant filed a further brief, designated "Defendant's Supplemental Memorandum in Support of Motion to Quash Writ of Attachment". The Preliminary Statement in that last mentioned brief of Defendant and the argument therein clearly relate to and respond directly to the question of the existence of a *prima facie* case on both propositions advanced by the Plaintiff, i.e. (1) the commission on the renewal; and (2) the commission on the taking of additional space.

On December 9, 1964, Plaintiff served and filed a reply to Defendant's supplemental memorandum on Defendant's motion to quash the writ of attachment, accompanied by an amended complaint filed under Rule 15 (a) Fed. R. Civ. P., Appendix B, *infra*.

The memorandum filed with the amended complaint, as aforesaid, clearly states the intention of the Plaintiff. The amended complaint was filed to conform the pleadings to the proofs then already under consideration by the Court, which proofs had already been the subject of argument and briefing by both counsel.

5. Petitioner states, referring to Broker's claim in the original complaint: "Kresge had never agreed to pay such additional commissions." This appears at page 4 in the Petition. Broker claims to the contrary, asserting that the December 12, 1956 letter agreement, in fact, constitutes an agreement to pay the commissions claimed.

ARGUMENT

I

Assuming *arguendo* that the position of Kresge on the question of jurisdiction merits legal argument in the light of the facts, there is no federal question.

The disposition of the challenge to jurisdiction will turn on the facts involved, not the law. We have no quarrel as a matter of law with the proposition that if in the circumstances of this case the amended complaint set forth a new and independent cause of action, the jurisdiction acquired through attachment is defeated. Jurisdiction of the federal court having been invoked solely on grounds of diversity, the federal court sits as a state court in deciding this case. P., App. D. at p. 43a.

Petitioner is seeking *certiorari* to obtain disposition of a question which the court is to pass upon as though it were a court of the State of New Jersey.

The determination of the question: "Did the amended complaint state a new and independent cause of action?" does not fit the limited and special class of issues contemplated under Rule 19, Sup. Ct. of the U. S. Rev. Rules.

II

Assuming *arguendo* eligibility for the grant of certiorari under Rule 19, *supra*, the Petition does not advance a reason for the granting of the writ.

The ultimate issue which the Petitioner seeks to determine is whether or not the amended complaint states a new and distinct cause of action when compared to the

original complaint. The question was fully briefed in the district court on the argument of the cross motions for summary judgment. The respondent's argument to the question was reprinted for the benefit of the Court of Appeals for the Third Circuit in the Supplemental Appendix in Plaintiff's Reply Brief at p. 10a *et seq.*

In its essence, Petitioner's argument must fail since it stands only on the flimsy premise that the original pleading sought commissions for a *renewal* (two floors), whereas the amended pleading seeks commission (damages) for the renewal *and the taking of additional space.* The defense has consistently failed to recognize that the damages are claimed in both pleadings on account of a single agreement, the December 12, 1965 commission agreement, which agreement is referred to by the court below as the "letter agreement".

The more detailed delineation of the claim in the amended complaint, by specifically seeking damages for taking of the additional floors, merely gives express definition to the *damages* sought arising out of the agreement between the Landlord and Tenant in 1964.

Petitioner's repeated assertions that the amended pleading: "nearly doubled" the damages originally claimed, Petition p. 7; that the claim in the amended pleading is "twice as large", Petition p. 8; and that the "Broker here doubled the damages claimed", Petition p. 8 are unfounded. As already noted, the original complaint was filed with an affidavit alleging commission to be due in the amount of $157,500.00. On interrogatories during discovery after the filing of the amended complaint, broker claimed $178,516.87. This is exclusive of a credit due to Kresge against the claim for commissions paid in advance at commencement of the 1957 lease on the 10 year rental. The credit would partially offset broker's claim on the renewal as to

floors 8 and 9 for the period between the commencement of the 1964 lease to the contracted expiration date of the 1957 lease in 1967. It is manifest that the Petition is devoid of merit in its reliance of the "new cause of action" theory.

CONCLUSION

The respondent submits that the issue upon which the petitioner seeks review is not a federal question. In fact all authority cited to urge granting of the writ is devoid of persuasion and serves to advance Respondent's argument in pointing to the absence of any question falling within the scope of eligibility for *certiorari*.

Examination of the ultimate issue apart from any concern with Rule 19, reveals no merit. The argument raised can be disposed of with the other issues remaining to be tried in the district court pursuant to the mandate on remand ready for issuance in the U. S. Court of Appeals for the Third Circuit, but now stayed pending consideration of the Petition in this Court.

By reason of all of the foregoing, it is urged that the petition for certiorari be denied.

Respectfully submitted,

WILLIAM L. GREENBAUM,
Attorney for Respondent.

Of Counsel:

ROBERT S. GREENBAUM,
GREENBAUM, GREENBAUM & ROWE.

APPENDIX A

Complaint

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—ESSEX COUNTY

DOCKET NO. L 1534 64

LOUIS SCHLESINGER COMPANY, a corporation of New Jersey,

Plaintiff,

vs.

THE KRESGE FOUNDATION, a Michigan Corporation, and KRESGE DEPARTMENT STORE, INC., a Delaware Corporation,

Defendants.

CIVIL ACTION

Plaintiff, a New Jersey corporation, maintaining a business office at 901 Broad Street, in the City of Newark, County of Essex and State of New Jersey, complaining of defendants, says:

1. Plaintiff is a licensed real estate broker in the State of New Jersey and operates principally in the field of commercial and industrial realty.

2. The defendant, The Kresge Foundation, is a trustee corporation of the State of Michigan which is not authorized to do business in this jurisdiction.

Appendix A

3. The said defendant, The Kresge Foundation, is the owner of record of a multi-story department store building in the City of Newark, New Jersey, bearing the street address of 715 Broad Street.

4. At the time of the transaction complained of hereinafter, the defendant, Kresge Department Store, Inc. was the occupant in possession of the aforementioned premises pursuant to an agreement with the defendant, The Kresge Foundation, the terms of which agreement are unknown at this time to plaintiff.

5. On or about December 12, 1956, the defendant, The Kresge Foundation, contracted in writing to pay plaintiff commissions for services to be rendered in procuring Western Electric Company as a tenant for space in the said building located at 715 Broad Street, said commissions to be in accordance with the rates and rules published by the Detroit (Michigan) Real Estate Board which were in effect at that time.

6. On or about December 12, 1956, the defendant, Kresge Department Store, Inc., contracted in writing to pay plaintiff commissions for services to be rendered in procuring Western Electric Company as a tenant for space in the said building located at 715 Broad Street, said commissions to be in accordance with the rates and rules published by the Detroit (Michigan) Real Estate Board which were in effect at that time.

7. The rules of the Detroit Real Estate Board with respect to commissions to be paid for procurement of leases, at the time immediately preceding the taking of space at 715 Broad Street, and applicable to that transaction provide as hereinafter set forth:

Appendix A

"2. For Negotiating Leases:

The commission for negotiating leases shall be as follows:

5% of the aggregate rental for one year or less, but in no instance less than one-half of the first month's rent . . . $25.00

'On leases for more than one year 5% of the aggregate rental for the first year and 2½% of the aggregate rental for the next four years, and 2% of the aggregate rental for the next five years, and 1% of the aggregate rental for the balance of the term up to the and including the 50th year.
(See rules "e" to "j" inclusive . . ."

"Lease With Privilege of Renewal"

"(e) Where lessee avails himself of privilege of renewal or extension of lease, or takes on additional space under provisions of original lease, the negotiating broker shall be entitled to additional compensation at same rates as applied to original case, when and as said lessee avails himself of such privileges."

8. On or about February 15, 1957, through the negotiations of plaintiff, the Western Electric Company entered into a lease with the defendant, The Kresge Foundation, for a period of ten (10) years, covering space on the eighth and ninth floors, said term to commence on the date of delivery of one half of the leased space on the eighth floor.

Appendix A

9. On or about April 12, 1957, The Kresge Foundation paid plaintiff Eighty One Thousand Five Hundred Fifty Two Dollars and Twenty Seven Cents ($81,552.27) for services rendered in connection with the successful negotiation of the aforesaid lease covering the aforesaid space.

10. On or about June, 1964 the Western Electric Company acquired as tenant additional space on the three additional floors of the building at 715 Broad Street, the precise square footage of which and precise terms of which lease agreement are unknown to plaintiff at this time.

11. On or about May 11, 1964, plaintiff, upon receiving notice of a proposed sale of the leased premises, confirmed to the defendants, Kresge Department Store, Inc., and The Kresge Foundation and other plaintiffs' right to commission in connection with the leasing of additional space to Western Electric Company.

12. Subsequently plaintiff, hearing of the lease transaction herein alleged, requested the defendants to furnish to it information as to the terms of the lease agreement.

13. The defendant, The Kresge Foundation, has failed to respond to plaintiff's inquiries.

14. The defendant, Kresge Department Store, Inc., has failed to respond to plaintiff's inquiries.

15. The defendant, The Kresge Foundation, is obligated jointly and severally with Kresge Department Store, Inc., to pay plaintiff commissions for the additional space taken by Western Electric Company, pursuant to the agreement dated December 12, 1956.

Appendix A

16. The defendant, Kresge Department Store, Inc., is obligated jointly and severally with The Kresge Foundation to pay plaintiff commissions for the additional space taken by Western Electric Company, pursuant to the agreement dated December 12, 1956.

WHEREFORE, plaintiff demands judgment against defendants, The Kresge Foundation and Kresge Department Store, Inc.:

(a) for the full amount of the commissions due and payable upon the additional taking of space by Western Electric Company, as per the agreement of December 12, 1956 between plaintiff and defendants;

(b) legal interest from the date of the accrual of the defendants' obligation to pay additional commissions to plaintiff;

(c) taxed costs of suit.

GREENBAUM & GREENBAUM
Attorneys for Plaintiff
By: MARTIN C. MAYER

APPENDIX B

Amended Complaint as to Defendant, The Kresge Foundation

Plaintiff, a New Jersey corporation, maintaining a business office at 901 Broad Street, in the City of Newark, County of Essex and State of New Jersey, by way of amended complaint against the defendant, The Kresge Foundation, says:

1. Plaintiff is a licensed real estate broker in the State of New Jersey and operates principally in the field of commercial and industrial realty.

2. The defendant, The Kresge Foundation, is a trustee corporation of the State of Michigan which is not authorized to do business in the State of New Jersey.

3. The said defendant, The Kresge Foundation, on December 12, 1956, and thereafter until October 1, 1964, was the owner of record of a multi-story department store building in the City of Newark, New Jersey, bearing the street address of 715 Broad Street.

4. On or about December 12, 1956, the defendant, The Kresge Foundation, contracted in writing to pay plaintiff commissions for services to be rendered in procuring Western Electric Company, Incorporated as a tenant for space in the said building located at 715 Broad Street, said commissions to be in accordance with the rates and rules published by the Detroit (Michigan) Real Estate Board which were in effect at that time.

Appendix B

5. The rules of the Detroit Real Estate Board with respect to commissions to be paid for procurement of leases, at the time immediately preceding the taking of space at 715 Broad Street, and applicable to that transaction provide as hereinafter set forth:

"Rules and Definitions

"(a) • • •

"(b) Commissions shall be deemed to have been earned when the price and terms are arranged between buyer and seller, lessor and lessee, or lender and borrower, the minds of both parties having fully met, and when a legally binding preliminary agreement bettwen the parties shall have been executed. Refusal to sign final papers, or defects in title, shall not bar agent of his commission."

"2. For Negotiating Leases:
The commission for negotiating leases shall be as follows:
5% of the aggregate rental for one year or less, but in no instance less than one-half of the first month's rent . . . $25.00

On leases for more than one year 5% of the aggregate rental for the first year and 2½% of the aggregate rental for the next four years, and 2% of the aggregate rental for the next five years, and 1% of the aggregate rental for the balance of the term up to and including the 50th year.

(See rules 'e' or 'j' inclusive)."

"Lease with Privilege of Renewal

"(e) Where lessee avails himself of privilege of renewal or extension of lease, or takes on additional

space under provisions of original lease, the negotiating broker shall be entitled to additional compensation at same rates as applied to original case, when and as said lessee avails himself of such privileges."

6. On or about February 15, 1957, through the negotiations of plaintiff, Western Electric Company, Incorporated entered into a lease with the defendant, The Kresge Foundation, for a period of ten (10) years for the eighth and ninth floors, said term to commence on the date of delivery of one-half of the leased space on the eighth floor. A copy of said lease heretofore filed in this cause is incorporated herein by reference.

7. Paragraph 3 of the lease of February 15, 1957, provides generally:

(a) A renewal option to the lessee for a renewal term of five (5) years; and

(b) A right of first refusal to the lessee to lease any additional space in the building which might become available during the term of the lease at a rental to be agreed upon by the parties.

8. On or about April 12, 1957, The Kresge Foundation paid plaintiff Eighty-One Thousand Five Hundred Fifty-Two Dollars and Twenty-Seven ($81,552.27) Cents for services rendered in connection with the successful negotiation of the aforesaid lease covering the aforesaid space.

9. On or about June 9, 1964, Western Electric Company, Incorporated, as tenant, acquired additional space on the fifth, sixth and seventh floors in the building aforesaid for

Appendix B

a term of five (5) years, with two one (1) year renewal options, by virtue of a certain lease agreement dated June 9, 1964, between The Kresge Foundation as lessor and Western Electric Company, Incorporated, as lessee, a copy of which agreement heretofore filed in this cause is incorporated herein by reference.

10. The lease agreement of June 9, 1964, aforesaid further provides for a five (5) year tenancy with two one (1) year renewal options between the parties aforesaid as to the eighth and ninth floors of the premises at 715 Broad Street.

11. The plaintiff was not advised by the parties to said lease of the existence of negotiations preceding the said agreement of June 9, 1964, and was thereby excluded from taking part in any negotiations between landlord and tenant.

12. The lease agreement of June 9, 1964, was recorded in the office of the Register of Essex County on October 1, 1964, in Book 407 of Deeds of said County at pages 350, etc.

13. To the extent that the 1964 lease provides for a term beyond the expiration date of the ten (10) year tenancy provided for in the 1957 lease, such taking constitutes a renewal of the lease as to the eighth and ninth floors by the tenant exercised pursuant to the privilege of renewal in the 1957 lease.

14. The letting aforesaid as to the fifth, sixth and seventh floors constitutes the taking of additional space under the provisions of the original lease agreement of 1957.

Exhibit B

15. The defendant, The Kresge Foundation, pursuant to the commission agreement of December 12, 1956, and the rates and rules of the Detroit Real Estate Board incorporated therein, is obligated to pay the plaintiff commissions for the taking of additional space and for the lease renewal effected by the lease agreement of June 9, 1964.

WHEREFORE, plaintiff demands judgment against the defendant:

(a) for the full amount of commissions due and payable upon the execution of the lease agreement of June 9, 1964;

(b) legal interest lawfully accruing thereon;

(c) taxed costs; and

(d) such other relief as shall be equitable and just in the premises.

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